



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2012-0079; FRL-9940-89-Region 4]

Air Plan Approval;

Alabama: Nonattainment New Source Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve portions of a revision to the Alabama State Implementation Plan (SIP) submitted by the Alabama Department of Environmental Management (ADEM) to EPA on May 2, 2011. The SIP revision modifies Alabama's nonattainment new source review (NNSR) regulations in their entirety to be consistent with the federal new source review (NSR) regulations for the implementation of the criteria pollutant national ambient air quality standards (NAAQS). EPA is approving portions of the NNSR rule changes in Alabama's May 2, 2011, SIP revision because the Agency has determined that the changes are consistent with the Clean Air Act (CAA or Act) and federal regulations regarding NNSR permitting.

DATES: This rule will be effective [insert 30 days after date of publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2012-0079. All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Alabama SIP, contact Mr. D. Brad Akers, Air Regulatory Management Section, Air Planning and Implementation Branch, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Mr. Akers can be reached by telephone at (404) 562-9089 or via electronic mail at akers.brad@epa.gov. For information regarding NSR, contact Ms. Yolanda Adams, Air Permits Section, at the same address above. Telephone number: (404) 562-9214; e-mail address: adams.yolanda@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

EPA is taking final action to approve the portion of Alabama's May 2, 2011, SIP revision that makes changes to Alabama's NNSR program, set forth at ADEM Administrative Code, Division 3, Chapter 14, Subchapter .05 (ADEM Rule 335-3-14-.05), which applies to the construction and modification of any major stationary source in or near a nonattainment area (NAA) as required by part D of title I of the CAA. Alabama's NNSR regulations at ADEM Rule 335-3-14-.05 were originally approved into the SIP on November 26, 1979 (*see* 44 FR 67375), with periodic revisions approved through December 8, 2000 (*see* 65 FR 76938). Alabama's May 2, 2011, SIP revision modifies the State's NNSR regulations in their entirety¹ with a new version that reflects changes to the federal NNSR regulations at 40 Code of Federal Regulations (CFR) 51.165,² including provisions promulgated in the following federal rules: (1) "Requirements for Preparation, Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; Standards of Performance for New Stationary Sources," Final Rule, 57 FR 32314 (July 21, 1992) (hereafter referred to as the Wisconsin Electric Power Company (WEPCO) Rule); (2) "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual

¹ Some portions of the 2011 version of the regulations now being approved were previously approved by EPA. These portions remain the same in substance but may have undergone administrative updates and renumbering in the 2011 version.

² EPA's regulations governing the implementation of NSR permitting programs are contained in 40 CFR 51.160 - 51.166; 52.21, 52.24; and part 51, appendix S. The CAA NSR program is composed of three separate programs: PSD, NNSR, and Minor NSR. PSD is established in part C of title I of the CAA and applies in areas that meet the NAAQS - "attainment areas" - as well as areas where there is insufficient information to determine if the area meets the NAAQS - "unclassifiable areas." The NNSR program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS - "nonattainment areas." The Minor NSR program addresses construction or modification activities that do not qualify as "major" and applies regardless of the designation of the area in which a source is located. Together, these programs are referred to as the NSR programs.

Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects,” Final Rule, 67 FR 80186 (December 31, 2002) (hereafter referred to as the NSR Reform Rule); (3) “Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Reconsideration,” Final Rule, 68 FR 63021 (November 7, 2003) (hereafter referred to as the Reconsideration Rule); (4) “Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Removal of Vacated Elements,” Final Rule, 72 FR 32526 (June 13, 2007) (hereafter referred to as the Vacated Elements Rule); (4) “Prevention of Significant Deterioration and Nonattainment New Source Review: Reasonable Possibility in Recordkeeping,” Final Rule, 72 FR 72607 (December 21, 2007), (hereafter referred to as the Reasonable Possibility Rule); (5) “Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule To Implement Certain Aspects of the 1990 Amendments Relating to New Source Review and Prevention of Significant Deterioration as They Apply in Carbon Monoxide, Particulate Matter and Ozone NAAQS; Final Rule for Reformulated Gasoline,” Final Rule, 70 FR 71612 (November 29, 2005) (hereafter referred to as the Phase 2 Rule); (6) “Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5}),” Final Rule, 73 FR 28321 (May 16, 2008) (hereafter referred to as the NSR PM_{2.5} Rule); (7) “Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5}) – Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC),” Final Rule, 75 FR 64864 (October 20, 2010) (hereafter referred to as the PM_{2.5} PSD Increments-SILs-SMC Rule³); and (8) “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review

³ The D.C. Circuit vacated the portions of the PM_{2.5} PSD Increment-SILs-SMC Rule addressing the SMC and SILs (and remanded the SILs portion to EPA for further consideration) for PSD, but left the PM_{2.5} SILs in place for the NSR program in the table in § 51.165(b)(2). See *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013).

(NSR): Reconsideration of Inclusion of Fugitive Emissions; Interim Rule; Stay and Revisions”, Interim Rule, 76 FR 17548 (March 30, 2011) (hereafter referred to as the Fugitive Emissions Interim Rule).

EPA is not, however, approving into the Alabama SIP the portion of ADEM Rule 335-3-14-.05(1)(k) stating “excluding ethanol production facilities that produce ethanol by natural fermentation,” which Alabama promulgated pursuant to the federal rule entitled “Prevention of Significant Deterioration, Nonattainment New Source Review, and Title V: Treatment of Certain Ethanol Production Facilities Under the ‘Major Emitting Facility’ Definition,” Final Rule, 72 FR 24060 (May 1, 2007) (or the Ethanol Rule).⁴ EPA is also not acting on the provision at Rule 335-3-14-.05(2)(c)3 that excludes fugitive emissions from the determination of creditable emission increases and decreases.⁵ Finally, EPA is not acting on changes to ADEM’s rules regarding the PM_{2.5} significant impact levels (SILs) for PSD at Rule 335-3-14-.04(8)(h)1., the NNSR interpollutant offset ratios at ADEM Rule 335-3-14-.05(3)(g)1–4 and the sentence including those ratios which states “Interpollutant offsets shall be determined based upon the following ratios,” or the “actual-to-potential” NNSR applicability test at ADEM Rule 335-3-14-.05(1)(h),

⁴ Alabama’s changes to its NNSR regulations (at 335-3-14-.05(1)(k)) exclude “chemical process plants” that produce ethanol through a natural fermentation process from the NSR major source permitting requirement as promulgated in the Ethanol Rule (as amended at 40 CFR 51.165). See 72 FR 24060 (May 1, 2007). However, due to a petition by Natural Resources Defense Council to reconsider the rule, EPA is not proposing to take action to approve this provision into the Alabama SIP at this time. Pending final resolution, EPA will make a final determination on action regarding this portion of Alabama’s SIP revision.

⁵ The provision in question was originally approved into the CFR in the December 19, 2008 (73 FR 77882) final rule concerning the treatment of fugitive emissions for the purposes of NSR applicability. On April 24, 2009, EPA agreed to reconsider the approach to handling fugitive emissions and granted a 3-month administrative stay of the December 19, 2008 rule. After several stays, this provision was stayed indefinitely in the March 30, 2011 (76 FR 17548) Fugitive Emissions Interim Rule, pending a final reconsideration from EPA. For more information on fugitive emissions in NSR, see the September 1, 2015 proposed rulemaking (80 FR 52701) or refer to the Docket for this rulemaking.

all of which ADEM withdrew from EPA's consideration subsequent to the May 2, 2011 submittal.⁶

On September 1, 2015, EPA published a proposed rulemaking to approve the aforementioned changes to the Alabama NNSR program at ADEM Rule 335-3-14-.05. *See* 80 FR 52701. Comments on the proposed rulemaking were due on or before October 1, 2015. No comments, adverse or otherwise, were received on EPA's September 1, 2015, proposed rulemaking. Pursuant to section 110 of the CAA, EPA is now taking final action to approve the changes to Alabama's NNSR program as provided in the September 1, 2015, proposed rulemaking. The proposed rulemaking contains more detailed information regarding Alabama's SIP revision being approved today, and the rationale for this final action. More detailed information on the NNSR program can be found in the September 1, 2015, proposed rulemaking as well as the aforementioned final rulemakings.

II. This Action

Alabama currently has a SIP-approved NSR program for new and modified stationary sources found in ADEM regulations at Chapter 335-3-14. ADEM's NNSR preconstruction regulations are found at Chapter 335-3-14-.05 and apply to major stationary sources or modifications constructed in or impacting upon a nonattainment area as required under part D of title I of the CAA with respect to the NAAQS. The changes to Chapter 335-3-14-.05 that EPA is now approving into the SIP were provided to update the existing provisions to be consistent with the current federal NNSR rules, including the WEPCO Rule, 2002 NSR Reform Rule (and associated Reconsideration Rule and Vacated Elements Rule), Phase 2 Rule, NSR PM_{2.5} Rule,

⁶ For more information on the withdrawal of these elements from the initial May 2, 2011, submittal, see the September 1, 2015, proposed rulemaking (80 FR 52701) or refer to the Docket for this rulemaking.

PM_{2.5} PSD-Increment-SILs-SMC Rule, and Fugitive Emissions Interim Rule. These changes to ADEM's regulations became state effective on May 23, 2011.

III. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of portions of ADEM Regulation Chapter 335-3-14-.05 entitled "Air Permits Authorizing Construction in or Near Non-Attainment Areas," effective May 23, 2011, with revisions and additions to applicability, definitions, permitting requirements, offset rules, area classifications, air quality models, control technology review, air quality monitoring, source information, source obligation, innovative control technology, and actuals plantwide applicability limits, and with administrative changes throughout. EPA has made, and will continue to make, these documents generally available electronically through www.regulations.gov and/or in hard copy at the EPA Region 4 office (see the ADDRESSES section of this preamble for more information).

IV. Final Action

EPA is taking final action to approve the portions of Alabama's May 2, 2011, submission that make changes to Alabama's SIP-approved NNSR regulations set forth at ADEM Rule 335-3-14-.05, with the exceptions noted above. ADEM submitted the proposed changes to its NNSR SIP to be consistent with amendments to the federal regulations made by the WEPCO Rule, the 2002 NSR Reform Rule (and associated Reconsideration Rule and Vacated Elements Rule), Phase 2 Rule, NSR PM_{2.5} Rule, PM_{2.5} PSD Increment-SILs-SMC Rule, and the Fugitive

Emissions Interim Rule. The Agency is approving these changes to the Alabama SIP because they are consistent with section 110 of the CAA and EPA regulations.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect

until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [insert date 60 days from date of publication in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 18, 2015.

Heather McTeer Toney,

Regional Administrator,

Region 4.

40 CFR part 52 is amended as follows:

PART 52-APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42.U.S.C. 7401 *et seq.*

Subpart B – Alabama

2. Section 52.50(c) is amended under Chapter 335-3-14 by revising the entry for “Section 335-3-14-.05” to read as follows:

§52.50 Identification of plan.

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(c) * * *

EPA-Approved Alabama Regulations

State citation	Title/subject	State effective date	EPA approval date	Explanation
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Chapter No. 335-3-14 Air Permits				

Section 335-3-14-.05	Air Permits Authorizing Construction in or Near Nonattainment Areas	5/23/2011	[Insert date of publication in <u>Federal Register</u>] [Insert citation of publication]	With the exception of: the portion of 335-3-14-.05(1)(k) stating “excluding ethanol production facilities that produce ethanol by natural fermentation”; and 335-3-14-.05(2)(c)3 (addressing fugitive emission increases and decreases). Also with the exception of the state-withdrawn elements: 335-3-14-.05(1)(h) (the actual-to-potential test for projects that only involve existing emissions units); the last sentence at 335-3-14-.05(3)(g), stating “Interpollutant offsets shall be determined based upon the following ratios”; and the NNSR interpollutant ratios at 335-3-14-.05(3)(g)1-4.

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[FR Doc. 2015-33197 Filed: 1/8/2016 8:45 am; Publication Date: 1/11/2016]